Supreme Court, U. S.
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80-121
No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1979

OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION LOCAL 28, AFL-CIO,
Petitioner

v.

MIDWEST STOCK EXCHANGE, INCORPORATED; MIDWEST CLEARING CORPORATION; MIDWEST SECURITIES TRUST COMPANY; and MIDWEST STOCK EXCHANGE SERVICE CORPORATION,
Respondents

and

NATIONAL LABOR RELATIONS BOARD,
Party in Interest

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

May a reviewing court invalidate a National Labor Relations Board representation election which is the fair and free choice of the voters solely because the court's interpretation of a Board rule of law is different from that applied by the Board?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at F. 2d , and at 104 LRRM 2243, and is set out in the appendix to this petition.

The decision and order of the National Labor Relations Board in the unfair labor practice proceeding is reported at 241 NLRB No. 171.

The decision and certification of representative by the National Labor Relations Board and the Hearing Officer's Report and Recommendations are not reported. They are set forth in the appendix to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on May 2, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

STATUTE INVOLVED

The statutory provision involved is § 9 of the Labor Management Relations Act, as amended, 29 U.S.C. § 159 set forth in pertinent part in the appendix to this petition.

STATEMENT OF THE CASE

This petition rests on the principles handed down by this Court in *National Labor Relations Board* v. *Mattison Machine Works,* 365 U.S. 123 (1961), and *Federal Trade Commission* v. *Mary Carter Paint Co.,* 382 U.S. 46 (1965).

An election was conducted by the National Labor Relations Board among the office and clerical employees of the respondent Midwest Stock Exchange on January 26, 1978, upon a petition filed by the union, Office and Professional Employees International Union

Local 28, AFL-CIO. The union received a majority upon a tally of 182 for and 149 against.

Upon objections to the election filed by the Stock Exchange, a hearing was held before a Hearing Officer of the Board on the only objection considered of sufficient substance to proceed further. The objection, succinctly stated, adequately described the single issue:

> A Union pollwatcher unlawfully engaged in electioneering while the polls were open in the corridor immediately outside the polling area and along the line of march to the polling place.

The voting was conducted in two separate locations, only one of which was affected by the objection. An observer for the Union named Jonathan James, one of three Union observers at the particular polling place, was stationed outside the voting room in a hallway, seated in a chair alongside an observer for the employer named Sonja Griffin. Conversations between James and voters waiting in line to enter the voting room were alleged to have affected the outcome of the election.

A two-day hearing on the single objection was conducted before a Hearing Officer of the Board. The decisional outcome was framed under the standards handed down by the Board in *Milchem, Inc.*, 170 NLRB 362 (1968), and it likewise occupied the sole attention of the Court of Appeals when it considered the petition for review. The Hearing Officer, in her opinion in the case, stated the rule of *Milchem* as a prohibition against "sustained and prolonged conversations between agents of parties to the election and voters waiting to cast their ballots."

The entire hearing centered upon the activities of James, the Union observer. The Hearing Officer began her findings with this observation (App. 27-8):[1]

> Although Board agents stationed in the corridor outside the voting room repeatedly informed voters that the observers were not allowed to speak with them, continually throughout the election both Griffin and James were greeted and spoken to by voters waiting in line. Both returned greetings and briefly answered questions about their presence at the polling area. Having been warned at the preelection conference to "keep the conversations to a minimum" however, James and Griffin discouraged further conversations with voters, diverting them verbally and with gestures.

She went on to say that Griffin had more success in rebuffing voters than did James. Consequently, she took up some five separate incidents involving conversations between James and voters, and analyzed each one of them. After completing the portion of the opinion entitled, "Evidence," the Hearing Officer then proceeded to a concluding portion labeled, "Analysis."

This is where she discussed the applicability of the Board's rule in *Milchem, Inc., supra,* and concluded that the mild nature of James' activity "holds it outside the bounds of the *Milchem* proscription." Then, she proceeded to make the single most important finding in the entire case (App. 32):

> "James did not engage in prolonged or sustained conversations with any voters in the polling area."

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[1] This reference is to the appendix filed by the Midwest Stock Exchange in the court below in support of its petition for review of the Board order in this case. Further references will be cited similarly.

The Hearing Officer then recommended that the single objection be overruled and that the union should be certified. The Board, upon review, "hereby adopts the Hearing Officer's findings and recommendations" (App. 13-4). The Board then certified the union as the collective bargaining representative for office and clerical employees of the Stock Exchange.

The Exchange refused to bargain with the union, charges of unfair labor practices were brought, and upon summary judgment, the Board found the Exchange to be in violation. 241 NLRB No. 158. The Exchange then petitioned for review in the Court of Appeals for the Seventh Circuit. The union petitioner in the NLRB election proceeding, having been the charging party before the Board in the resultant unfair labor practice case, then moved to intervene as a party to the Court of Appeals proceeding, and such motion was granted by Judge Swygert, Sept. 24, 1979, by order entered.

To properly evaluate the case itself, it becomes necessary at this point to set forth what the Board's rule was in *Milchem,* as stated by the Board. It contained two distinct elements, accompanied by a reason for its purpose.

(1) At 170 NLRB 362, second column, 24th line:

> "Sustained conversations with prospective voters waiting to cast their ballots, regardless of the content of the remarks exchanged, constitutes conduct which, in itself, necessitates a second election." Later in the next paragraph the Board referred to "prolonged conversations."

(2) At 170 NLRB 363, first column, beginning in the 14th line:

> "We intend, of course, that our application of this rule will be informed by a sense of realism. The rule contemplates that conversations between a party and voters while the latter are in a polling area awaiting to vote will normally, upon the filing of proper objections, be deemed prejudicial without investigation into the content of the remarks. But this does not mean that any chance, isolated, innocuous comment or inquiry by an employer or union official to a voter will necessarily void the election. We will be guided by the maxim that 'the law does not concern itself with trifles.' "

The Board set forth fully the reason for the rule in the last sentence on p. 362 of its reported opinion: "This rule is nothing more than a preventive device to enforce the ban against electioneering in polling places normally applied in political elections and in our representation elections."

In beginning its review of the Board finding of a refusal to bargain, the Court of Appeals stated the argument made by the Stock Exchange that the Board had violated its rule in *Milchem* in that it had either misapplied *Milchem* to the undisputed facts or had made an impermissible departure from its previously stated policies without notice or explanation. The Court said, "We feel compelled to agree."

The Court then proceeded to make its own interpretation of what the Board rule in *Milchem* meant. "Without defining the point at which a 'trifling' comment becomes a prolonged conversation, the Board set aside an election where a union representative had

engaged in an estimated five minute conversation. Thus, it is clear that a five minute conversation is not *de minimus* and requires a second election."

The Court was able to seize upon the "five minute" line because in *Milchem,* the Board, in making three separate references to the proscribed conversation, had stated in one of these three references that a witness had deposed that he saw the union official in that case "perhaps five minutes and that he appeared to be talking to the men waiting to vote." The other two witness references both used the term, "several minutes." 170 NLRB 362, second column, p. 363, and second column, last paragraph.

Thus, one of three references to length of a conversation, "perhaps five minutes", was used by the Court to re-mold the *Milchem* rule from a prohibition against "sustained" or "prolonged" conversations into an absolute five-minute rule that would serve, standing alone, as sufficient to invalidate a Board election. Four paragraphs later in its opinion, it used the term, "*Milchem's* per se rule."

The Court found an alleged five minute violation in one single incident, and considered no other. It involved a conversation between union observer James and a voter named Jerri Thomas.

"We need look no farther than to the conversation between James and Mrs. Thomas to reach the conclusion that the Board without explanation departed from *Milchem* in the present case. Exchange observer Sonja Griffin estimated, and the Board credited her testimony, that James spoke to Mrs. Thomas for five minutes. Nevertheless, the hearing officer concluded that

Milchem was not violated because this was not a 'prolonged' conversation."

The Court went on, in the next paragraph of its opinion, to say that on the facts found by the Board, its conclusions were irreconcilable with the results in *Milchem*. It acknowledged that while the Board did not designate the transition point between a "trifling" comment and a "prolonged" conversation, "it unquestionably concluded that a five minute conversation falls within the latter category."

(We are now in the most doubtful area of the Court's rationale, since here we see the full effect of its substitution of the Board's "sustained" rule with its own interpretation of the absolute line of five minutes, without any consideration whatever of the other vital element of the rule, i.e., the sense of realism. It was further extending the rule beyond what the Board had anticipated: the rule was against conversations brought by the parties, or their agents to prevent electioneering; here, the critical conversation was not initiated by James at all, but by Mrs. Thomas, as the undisputed facts demonstrate.)

In its next sentence, the Court applied its *coup de grace* to the Board's determination. "The Board has failed to explain to this Court's satisfaction how a five minute conversation can be prolonged in one instance and not prolonged in another." That apparent contradiction will be fully resolved, we believe, when we come to reasons why the writ should be granted.

Here is what the hearing officer had said of the James-Thomas conversation (App. 28-29):

> Both James and Griffin were seated facing the voting line, which consisted of at least five and

> perhaps twenty persons. A voter in line, Jerri Thomas, greeted James with "What's happening?" He replied, "Nothing." Thomas thereafter asked him what he was doing there, and he explained that he was an observer. He then asked her what she had done the previous night, and inquired why she had her little girl with her. (Due to school closings, Thomas' 4-year-old daughter accompanied her mother to work that day.) Thomas replied that she would be taking her child home and probably returning to work later. Thomas then asked James whether he would watch the girl while she went in to vote. James said, "Yes," and Thomas commented that she would be right back. Griffin estimated that the entire conversation lasted 5 minutes. During this time, Thomas also conversed with other voters, and James was greeted by an unidentified voter.

That is all. Perhaps the best commentary on this entire affair may be taken from the initial exchange from Thomas to James. What's happening?—nothing.

The hearing officer did, however, in the Analysis portion of her opinion, comment further to say (App. 33): "James' conversation with Jerri Thomas was an exchange of pleasantries initiated by the voter when, upon, her arrival, she did not see any other familiar faces."

The Court, as it continued its opinion, had one further hurdle to surmount. The Board, in cases subsequent to *Milchem,* had indeed applied its sense of realism rule and had declined to vacate elections even when conversations contained substantive remarks dealing with matters of concern to voters. *Resins, Solvents and Varnishes Corp.,* 227 NLRB 959 (1977) (conversation in Spanish between observer and voter

on how to cast a ballot which was alleged by employer to be "extended conversation"); *Century City Hospital,* 219 NLRB 52 (1975); *Hecla Mining Co.,* 218 NLRB 61 (1975); *Bostik Division, USM Corp.,* 209 NLRB 956 (1974), affirmed, 517 F. 2d 971 (6th Cir. 1975). It concluded that these cases were not to the contrary, and deftly bifurcated the *Milchem* rule:

> "That is, where conversations are of a much shorter duration than the one condemned in *Milchem, Milchem's* per se rule is not applicable, and it becomes necessary to make a case by case inquiry into the nature and effect of the conversation, which inquiry must be tempered by a sense of realism."

Accordingly, as perceived by the Court below, there are two separate and distinct situations to be considered where conversations at the polling place occur:

> (1) When conversations are of five minutes or more in duration, an absolute per se rule of invalidating the election, and (2) when conversations are of lesser duration, a case by case inquiry into the nature and effect, tempered by a sense of realism.

It may hardly be disputed that the National Labor Relations Board has never explicated such a division, in *Milchem* or in any other holding.

The other critical element in the case was the forgotten one: whether the result of the election represented the free and fair choice of the voters. Regrettably, that important consideration was never once discussed by the Court of Appeals. It was omitted from the case entirely as if it were a factor not to be considered at all.

Because of its status as a party respondent in the Court of Appeals below, petitioner has brought this matter here seeking certiorari to review the ruling of the Court below.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. Important Labor Election Rights Are At Stake: Employees Are Entitled To Have Results Of Free And Fair Elections Validated

One could hardly imagine a more trifling basis for setting aside a secret ballot election than a single conversation in a hallway outside the polling place initiated by a voter to an observer for one of the parties. This is especially so when the conversation itself, overheard by several persons, had absolutely nothing to do with the election, but centered solely around initial greetings and a request by the voter to the observer to watch the voters's child while the voter entered the voting room.

Yet, the majority vote of the employees of the Midwest Stock Exchange to select a bargaining representative has been set aside and nullified by the reviewing court because its interpretation of an election rule of the Labor Board was different from that applied by the Board, and where there was not the slightest evidence that the single chance encounter in the hallway had anything whatever to do with the outcome of the election.

Employee free choice is entitled to more respect than that.

The serious decision on a collective bargaining representative, solemnified in a secret ballot election after a campaign conducted according to law, ought not be

invalidated for trifling and dubious reasons in any situation where there is no showing that a free and fair election was impacted. Disputes among judges and decision makers over the meaning of broadly stated rules of law and their application hardly justify destroying what free choice has wrought, or else representation elections can become so bogged down in technicalities that employees would not be justified in ever having confidence in their eventual outcome.

A free and fair election is surely what the law envisions. And when a free and fair election occurs, it is equally vital that the result be validated. A democratic society, whether in voting for a president or a constable or a collective bargaining representative, is entitled to have its choice, fairly made, put into effect. Otherwise, the resultant loss of confidence and security would cause disintegration and a rendering useless of the balloting itself.

There can hardly be a question of greater public importance in our society than the legal validation of democratic elections that are fairly conducted. Whether a court of law, sitting in review of the agency in charge of the election, ought to be allowed to interpose interpretative rules, alterations of established rules, or differences of opinion with the agency in charge *when there is no conceivable impact on the free and fair choice of the voters* is an equally important question that ought to be reviewed.

Heretofore, judicial review of NLRB elections has concerned itself in almost every case with the fundamental inquiry of whether the result reflected the free and fair choice of the voters. That was the essence of this Court's ruling in *NLRB* v. *Mattison Machine*

Works, 365 U.S. 123 (1961). It began in *NLRB* v. *A. J. Tower Co.,* 329 U.S. 324, 330-1 (1946), when this Court pointed out that Congress had entrusted the Board with the discretion to establish the procedure and safeguards "necessary to insure the fair and free choice of bargaining representatives by employees . . ."

When this Court has had occasion to nullify a NLRB election, it has done so because the underlying conduct involved was found to interfere with the fair and free choice of employee voters. *NLRB* v. *Savair Manufacturing Company,* 414 U.S. 270 (1973).

Among the numerous court cases where Board conducted elections have come under challenge, a few distinct categories of cases emerge. Some of them involve threats and coercion in the voting process, others entail misrepresentation of facts by campaigners, and others deal with fair procedures in the balloting process itself. Citations of examples would extend this petition for certiorari into a near-treatise on the subject. But it may be safely said that in each category of cases, reviewing courts almost always inquire as to whether the challenged conduct had an unfair or wrongful impact upon the free choice of the voters.

In only one limited category of cases, involving impropriety of Board agents or abuse of Board processes, is there no inquiry ordinarily made into whether the conduct had an impact on voter free choice. See *Delta Drilling Co.* v. *NLRB,* 409 F. 2d 109 (5th Cir., 1969). And the rationale of those cases must surely be that if the agency conducting the election shows partiality or bias, free and fair choice of voters will ultimately be undermined.

Thus, free and fair choice of the voters, with validation of the results, has been an integral part of the national labor policy since Congress passed the statute. Free and fair choice, of course, is meaningless without validation. It was this recognition that caused this Court in *Mattison Machine Works, supra,* to impose the burden of proof on one who seeks to invalidate a Board election to show that conduct affected "the fairness of the representation election." 365 U.S. at 123.

This case's public importance rests in part, therefore, on a departure from the long-established democratic and statutory value that a free and fair election ought to be validated. An earlier departure from that value in *Mattison Machine Works* was corrected in a per curiam paragraph whose importance may have been obscured by the passage of time.

Review of this case is essential to re-establish the principle that free and fair elections, whether run by the Labor Board or any other entity in our society, ought to be validated when there is no proof of any conduct that would impact the democratic choice of the voters.

II. Board Determinations In Elections Cases Are Again At Issue: Its Interpretation And Application Of Its Own Rules Must Be Respected Absent A Demonstrable Abuse Of Discretion

It was the Board, not the courts, that promulgated the *Milchem* rule. Its purpose was clearly stated: to enforce the ban against electioneering in polling places normally applied in political elections and in our representation elections. It was the Board that interpreted the *Milchem* rule in its later decisions. ***Resins, Solvents and Varnishes Corp., supra; Century City***

Hospital, supra; Hecla Mining Co., supra; Bostik Division, USM Corp., supra; see also, *Pastoor Bros. Co.,* 223 NLRB 451 (1976), and other cases.

It was the Board that said that "sustained conversations" were prohibited without defining precise boundaries for what was sustained or prolonged, ostensibly leaving it to the facts of each case. The Board wisely refrained from a per se five-minute rule envisioned by the Court of Appeals. And it was the Board, of course, upon all the evidence before it, that adopted a finding that upon the facts of this case, there was no "sustained or prolonged conversation" between James and any voter. It was the Board that considered the additional element of its own rule that it would not be concerned with trifles. (App. 32). It was the Board that found that the fundamental purpose of the rule, avoidance of electioneering, was not even suggested by the facts (App. 33).

Since all of this was not persuasive to the Court below, the important public question, although presumably long ago settled in many prior decisions, *NLRB* v. *A. J. Tower, supra,* and other rulings, of how much deference should be paid to decisions of the Board, and other administrative agencies as well, comes to the fore.

The question may thus be posed, even when a reviewing court disagrees with the Board's own interpretation and application of its own policy, should a decision be set aside absent a demonstrable abuse of discretion by the agency?

This inquiry goes beyond the National Labor Relations Board into every quasi-judicial administrative agency.

This Court has dealt with a similar problem involving the Federal Trade Commission in *FTC* v. *Mary Carter Paint Co.*, 382 U.S. 46 (1965). In many respects, the thrust of the question presented in *Mary Carter Paint* is more like the issues in the instant case than even in *Mattison Machine Works, supra.* The FTC had undertaken to interpret and apply two earlier decisions in deceptive advertising cases, just as the NLRB here has undertaken to interpret and apply its *Milchem* ruling to the facts of the instant matter. The reviewing Court of Appeals in *Mary Carter Paint* disagreed with the FTC's application of those two earlier decisions. This Court granted certiorari and concluded, at 382 U.S. 46, 49, that the Commission's determination was neither arbitrary nor clearly wrong, and that it should have been sustained. Was the NLRB's determination in this case, especially when all the elements are taken into account, that *Milchem* was not violated either arbitrary or clearly wrong? A powerful argument can be made for just the opposite conclusion: that the Board was discharging its election-supervisory function in a commendable and discerning way.

FTC v. *Mary Carter Paint Co., supra,* stands four square against what was done by the reviewing court in this case below.

The five-minute line drawn by the Court of Appeals and the obliteration of electioneering as a necessary element of proscription are highly cogent reasons why the Board's finding must be accorded even unusual deference in this case.

It must be repeated that the Board did not adopt a five-minute line in *Milchem* for what was a "sus-

tained or prolonged conversation." Yet the Court of Appeals turned it into a per se rule. Then, the Court, having concluded that there was indeed a per se five-minute rule, said, "The Board has failed to explain to this Court's satisfaction how a five minute conversation can be prolonged in one instance and not prolonged in another."

Just as the Board in *Milchem* did not make an express finding that a conversation of five minutes occurred (two witnesses referred to "several minutes" and one to "*perhaps* five minutes") the hearing officer in this case merely said that "Griffin estimated" and in general, credited Griffin's testimony. What the hearing officer did find was that the conversation was not sustained or prolonged.

Fine line drawing of this kind placed petitioner here at a distinct disadvantage. When it participated in the case below, its purpose was not to discredit the hearing officer, but to uphold her conclusion based upon a finding that no prolonged or sustained conversation occurred. But to demonstrate how these matters can become distorted as they become entangled in judicial analysis, one must, in all fairness, revert to the original hearing record to determine what was actually said (even though we dislike having to do so in a petition seeking certiorari).

At p. 30 of the hearing transcript, beginning at line 16, on direct examination of Griffin by Midwest's counsel, dealing specifically with the Thomas-James conversation, this occurred:

Q. How long did he talk with her?

A. Maybe four or five minutes.

"*Maybe* four or five minutes" was expressed by the hearing officer as an "estimated five minutes" and turned by the Court of Appeals into an absolute clock version. (Other time estimates by Griffin on the record were shown to be vast, distorted guesses as well, all of which were heard by the hearing officer, but not elucidated in the concise finding of no prolonged or sustained conversations).

This kind of pulling and extracting, relying on "perhaps" and "maybe" in matters of such importance, nitpicking a record into its finer points, is in itself a demonstration of the crying need for affirmation of the Board's finding. It should not be necessary to have to justify whether the conversation was four minutes or five minutes or the minute and a half that it most likely was, based upon the evidence in the record. It should be enough that the Board, reviewing all the evidence, was not "arbitrary" or "clearly wrong," to use the words of *Mary Carter Paint.*

The other consideration in deferring to the Board's judgment concerns the important matter of electioneering. The Board was aware that the purpose of the rule was to prohibit electioneering at the polls, not construct an interpretative domain for facile lawyers to pick apart as reasons to invalidate free and fair representation elections. It found in this case no possible link between the challenged conduct and electioneering. It considered its rule against trifling conduct, which the Court below ignored. It considered how it had applied *Milchem* in subsequent cases, which required the Court below to re-construct the rule itself in order to make it fit within the Court's conception of its decision in this case.

This kind of verbal slicing can only give comfort to those who wish to avoid the national labor policy of validating free and fair representation elections as an essential part of the collective bargaining process itself. It will surely increase crowded appellate dockets as employer lawyers will be encouraged to file even more petitions in the hopes of having a reviewing court bifurcate other Board doctrines and vacate elections without any consideration of whether they were free and fair. It will promote further resistance to collective bargaining.

Unfortunately, wise pronouncements by some courts in cases in this area too often fall into obscure neglect. The Ninth Circuit made the same point we have tried to make above nearly twenty years ago in *International Tel. & Tel. Corp.* v. *NLRB,* 294 F. 2d 393, at 395 (9th Cir., 1961), when it said:

> As established by Congress, the NLRB is in a particularly good position to expedite the process of choosing representatives and thereby promoting collective agreements fairly reflective of the wishes of a majority of workers. Repeated appellate court litigation without allowing considerable discretion on the part of the NLRB thwarts this policy by nurturing continuing uncertainty and argument between the parties where decision —even occasionally erroneous decision—tends to disperse attention.

This is why it becomes so important from time to time to re-affirm the role of the Board in deciding election cases. Decisions of the kind here lead to confusion and conflicting results. While we cannot maintain that a definable, distinct doctrinal conflict exists with decisions propounded by another Court of Ap-

peals, it should be clear that there is a great diversion in principle where decision-making is involved. Cf. *NLRB* v. *Allis-Chalmers Corp.*, 601 F. 2d 870 (5th Cir., 1979), in a misrepresentation case where the court did defer to the Board's interpretation of one of its previous decisional rules; *Melrose-Wakefield Hospital Association* v. *NLRB*, 615 F. 2d 563 (1st Cir., 1980), another misrepresentation case, where the First Circuit said:

> We think that in this indeterminate region where a party has transgressed a Board policy, but to a less extent than parties sanctioned in earlier Board cases, we should defer to the Board's judgment of the grievousness of the infraction.

That, of course, is near to precisely what is involved in this case.

The appellate departure from the principles of *Mary Carter Paint* and labor decisions like the recent ones cited above, with its resultant confusion, the "nurturing continuing uncertainty," and promotion of repeated appellate court litigation in an area where the Board must be allowed to resolve election disputes absent a demonstrable abuse of discretion make this case a matter of grave public importance in the administration of the Act, and it should be reviewed by this Court.

CONCLUSION

For the reasons set forth heretofore, this petition for certiorari should be granted.

Respectfully submitted

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80-121

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APPENDIX

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IN THE UNITED STATES COURT OF APPEALS
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No. 79-1501

MIDWEST STOCK EXCHANGE, INCORPORATED; MIDWEST CLEARING CORPORATION; MIDWEST SECURITIES TRUST COMPANY; and MIDWEST STOCK EXCHANGE SERVICE CORPORATION,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition For Review of an Order of the National Labor Relations Board

ARGUED JANUARY 10, 1980—DECIDED MAY 2, 1980

Before PELL, *Circuit Judge,* PECK, *Senior Circuit Judge,** and WOOD, *Circuit Judge.*

PECK, *Senior Circuit Judge.* This case is before the Court on a petition by Midwest Stock Exchange, Inc., Midwest Clearing Corporation, Midwest Securities Trust Company, and Midwest Stock Exchange Service Corporation (the Exchange) to review, and a cross-application of the National Labor Relations Board (the Board) to enforce an order issued by the Board against the petitioners. The order directs the Exchange to bargain collectively with Local 28 of the Office and Professional Employees International Union (the Union). It rests on the Board's decision that the Exchange's refusal to bargain with the Union constituted an unfair labor practice in violation of section 8(a)(1) and 8(a)(5) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1), (5).

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* Honorable John W. Peck, Senior Circuit Judge of the United States Court of Appeals for the Sixth Circuit, sitting by designation.

The Board's order is entitled to enforcement unless the Union was improperly certified by the Board as the collective bargaining representative of the Exchange's employees. *Celanese Corp. of America v. N.L.R.B.*, 291 F.2d 224 (7th Cir. 1961), *Monmouth Medical Center v. N.L.R.B.*, 604 F.2d 820 (3rd Cir. 1979). We hold that the Board's certification of the Union in this case is inconsistent with its declared policy as established by its previous decisions, and we deny enforcement.

On September 12, 1977, the Union filed a representation petition with the Board seeking certification as the bargaining representative of all full and part-time office and clerical workers of the Exchange. An election was held on January 25, 1978, and the Union won the election by a vote of 182 to 149; 28 challenged ballots were resolved by stipulation of the parties.

The Exchange timely filed objections to conduct affecting the results of the election, alleging among other things, that (1) the Union interfered with the election through the electioneering activity of its authorized "election observer," Jonathan James, at and away from the polling area, and (2) the Board's failure to control James's activities in the polling area constituted misconduct warranting a new election. Subsequently, a hearing was held to resolve these two issues.

The hearing officer made findings of fact based on the testimony of several witnesses, including Exchange observer Sonja Griffin, Board agents assigned to the election, employees who voted in the election, and Jonathan James, the Union observer. With few exceptions, petitioners do not here dispute the factual findings of the hearing officer; what they do contest are the conclusions drawn from the facts as established. Because our disposition of this case is based solely on the facts as found, the facts appearing hereinafter are extracted exclusively from the Report of the hearing officer, as adopted by the Board.

I

The hearing officer found that James engaged in conversations with several voters during the course of the election. On one occasion, three voters greeted James, who was seated at the time in the corridor outside the voting room, upon entering the voting area. After a brief exchange, the three men joined the line of employees waiting to vote. When they emerged from the voting room, they dallied in the corridor, and James approached and spoke with them for about one minute before a Board agent interrupted and ended the conversation.

Shortly thereafter, a noisy group of seven or eight employees got in line to vote. James "whispered" to a female in the group. More than a few words were spoken, but the conversation apparently lasted less than a minute. There was no evidence as to the content of the conversation. The voting line consisted of from ten to fifteen voters during both conversations cited above.

In another incident, a young man joined the voting line, greeted James, and then began talking to him about work, though there was no testimony as to any specific comments made. The conversation then turned to "friendly banter." The entire incident lasted from three to five minutes and took place in the presence of fifteen voters. Again the conversation ended when a Board agent intruded and asked James to "cut his conversations short."

The lengthiest conversation occurred early in the voting process. Mrs. Jerri Thomas, accompanied by her four-year-old daughter, was standing in the voting line, which consisted of from five to twenty persons. James was seated in the corridor, opposite the voting line and next to Sonja Griffin, the employer's observer. As the hearing officer found:

> Jerri Thomas, greeted James with "what's happening?" He replied, "Nothing." Thomas thereafter

> asked him what he was doing there, and he explained that he was an observer. He then asked her what she had done the previous night, and inquired why she had her little girl with her. . . . Thomas replied that she would be taking her child home and probably returning to work later. Thomas then asked James whether he would watch the girl while she went in to vote. James said "Yes," and Thomas commented that she would be right back. Griffin estimated that the entire conversation lasted 5 minutes. During this time, Thomas also conversed with other voters, and James was greeted by an unidentified voter.

The babysitting of Thomas' daughter is another incident of which petitioners complain. After James agreed to watch Thomas' daughter, the girl crossed the hallway and sat on James's lap, where she remained until her mother returned from the voting room. The time that elapsed during this incident was estimated by one witness to be four minutes and by another to have been fifteen to twenty minutes, though the hearing officer made no specific finding as to the length of the episode. While on James's lap, the girl chatted with him and the two played with a toy bank containing a few pennies.

The final specific instance of conduct that petitioners allege invalidated the election occurred away from the polling area, but, arguably, on the "line of march" to the polling place. Having earlier asked a Board Agent's permission to leave for lunch, James left the polling area about two hours after the voting had commenced. James traveled by elevator from the 12th floor, where the election was being held, to the lobby and continued to the basement by way of the stairs. James proceeded to a locker room in the basement where he took off his observer's badge and put it in his pocket. The hearing officer found that James engaged in a three-minute conversation with three em-

ployees in the lobby. The content of that conversation was not disclosed.

Board agent Hoffman, one of the agents responsible for the conduct of the election, estimated that he admonished James to refrain from conversing with employees waiting to vote on no less than six occasions, and that, as the hearing examiner found, several other incidents escaped detection.

After applying what she deemed to be the relevant principles of law to the facts as found, the hearing officer recommended that petitioners' objections be overruled on the grounds that the conversations of the Union observer with employees were merely brief, innocuous exchanges and did not involve the appearance of electioneering, and the observer's performance of child care services was only a courtesy performed in response to a request. She further recommended that the Union be certified to represent petitioners' employees. The exchange filed Exceptions to the Hearing Officer's Report, but a three-member panel of the Board unanimously affirmed the Report, without opinion, and certified the Union as the exclusive bargaining representative of the Exchange's clerical and office employees.

The Exchange refused to bargain with the Union, and an unfair labor practice hearing was commenced. The Exchange defended its refusal to bargain on the ground that the Board's certification was invalid and that the Exchange, therefore, was under no legal obligation to bargain with the Union. The Board rejected this argument, granted the Regional Director's Motion for Summary Judgment against the Exchange, and issued the order to bargain which is the subject of the petition presently before this Court.

II

The first question of law to be addressed is the scope of judicial review of Board orders respecting the validity

of representation elections. The Board asserts that the court must limit its inquiry to whether the Board's determination falls within its "wide degree of discretion," and petitioners must show that the Board clearly abused its discretion in overruling petitioner's objections.

This Court has explained clearly the balance between the Board's discretion to establish rules governing election procedures and the Court's obligation to review the Board's application of those rules. In *Celanese Corp. of America v. N.L.R.B.*, 291 F.2d 224, 225 (7th Cir. 1961), this Court held that the Board's "wide discretion" lies in the initial promulgation of rules and regulations establishing the procedures and safeguards for conducting representation elections. *See also N.L.R.B. v. A. J. Tower Co.*, 329 U.S. 324, 330 (1946). We went on to say, however, that the courts of appeals bear the responsibility of reviewing the Board's specific application of its rules. 291 F.2d at 225. "Judicial review in these cases is not concerned with the wisdom of the Board's policy but must determine whether the record as a whole supports the findings and conclusions respecting compliance with the policies, rules, and regulations promulgated by the Board." *Id. See also N.L.R.B. v. Mosey Mfg. Co., Inc.*, 595 F.2d 375, 377 n. 5 (7th Cir. 1979).

The Board is not forever bound by its prior declarations of policy, and is free, for example, to exercise its discretion to alter its rules when, in the wisdom gained through experience, it concludes that its rules have failed to effectively safeguard elections or when it finds a rule to be unduly burdensome. *N.L.R.B. v. Mosey, supra*, 595 F.2d at 375. Where the Board has promulgated standards governing the conduct of an election, however, those standards are controlling until the Board announces a change and its reason for the change. *See Delta Drilling Co. v. N.L.R.B.*, 406 F.2d 109 (5th Cir. 1969). Until such a change is announced, the Board's application of its standards must be reasonably consistent with its previous decisions. *Mon-*

mouth Medical Center v. N.L.R.B., 604 F.2d 820, 823 (3rd Cir. 1979). The duty of this Court then, is to examine the Board's conclusions in the case before us and determine whether the Board has fairly applied its chosen standard. *Hometown Foods, Inc. v. N.L.R.B.*, 416 F.2d 392, 395 (5th Cir. 1969). It follows that whether we are in agreement with such conclusions of the Board is irrelevant.

III

Petitioners argue that the conduct in the instant case violates the rule set forth by the Board in *Milchem, Inc.*, 170 NLRB 362 (1968), and that the Board's decision is either a misapplication of the *Milchem* standard to the undisputed facts, or an impermissible departure from its previously stated policies without notice or explanation. We feel compelled to agree.

We begin our analysis by considering the precursor to *Milchem, supra,* establishing the Board's general policy with regard to protecting the integrity of the election process. In *General Shoe Corporation,* 77 NLRB 124, 127 (1948), the Board established the basic standard for evaluating conduct during elections:

> In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible to determine the uninhibited desires of the employees. It is our duty to establish those conditions; it is also our duty to determine whether they have been fulfilled. When, in the rare extreme case, the standard drops too low, because of our fault or that of others, the requisite laboratory conditions are not present and the experiment must be conducted over again.

The Board reaffirmed its commitment to insure the integrity of the election process when, in *Milchem, supra,* it

declared that elections would be overturned where representatives of any party to the election engaged in "prolonged" conversations with voters waiting to cast their ballots, regardless of the content of the remarks exchanged. 170 NLRB at 362. The Board reasoned that the potential for distraction, last minute electioneering, and unfair advantage, justified a "strict rule" against such conduct, without requiring an examination into the substance or effect of the conversations. *Id.* Recognizing the impossible task of eliminating all conversations in the polling area, the Board stated that its rule would not necessarily void elections upon the occurrence of "any chance, isolated, or innocuous comment." *Id.* at 363. Without defining the point at which a "trifling" comment becomes a prolonged conversation, the Board set aside an election where a union representative had engaged in an estimated five minute conversation. Thus, it is clear that a five minute conversation is not *de minimus* and requires a second election. *See Sonoco Products Co. v. N.L.R.B.*, 443 F.2d 1334, 1337 (9th Cir. 1971).

We need look no farther than to the conversation between James and Mrs. Thomas to reach the conclusion that the Board without explanation departed from *Milchem* in the present case. Exchange observer Sonja Griffin estimated, and the Board credited her testimony, that James spoke to Mrs. Thomas for five minutes. Nevertheless, the hearing officer concluded that *Milchem* was not violated because this was not a "prolonged" conversation. The hearing officer sought to further distinguish *Milchem* by stating that the incident did not involve "a one-to-one conversation: other voters took part at will." Finally, the hearing officer declared that the circumstances in the present case did not "even suggest the appearance of electioneering, the basis for the *Milchem* proscription of conversation."

However, given the facts as found by the Board, its conclusions based thereon are irreconcilable with the result in *Milchem*. First, though the Board in *Milchem* did not at-

tempt to designate the transition point between a "trifling" comment and a "prolonged" conversation, it unquestionably concluded that a five minute conversation falls within the latter category. The Board has failed to explain to this Court's satisfaction how a five minute conversation can be prolonged in one instance and not prolonged in another. In the absence of a Board announcement of a change in the *Milchem* standard and its reason for the change (the Board does not contend that it has overruled *Milchem*), it is our judgment that the Board misapplied its established rule.

The Board asserts that it followed the dictates of *Milchem* in approving James's conduct because there was "no appearance of electioneering," the basis for the *Milchem* decision. It argues to this Court that James's remarks were innocuous and there was no potential impact on the voters. The appearance of electioneering, however, was but one of several reasons advanced in *Milchem* for strictly prohibiting conversations of this type. There the Board explained that is was also concerned that voters would be distracted during the final minutes before they cast their vote. These last few moments before voting, the Board reasoned, should be the voter's own, "as free from interference as possible"; a time during which a voter can consult his own conscience without interruption. 170 NLRB at 362-363. It was for this reason, as well as its concern with the appearance of electioneering that might result from prolonged conversations, that prompted the Board to adopt a "blanket prohibition" against such conversations, without inquiry into their "substance or effect." *Id.* Thus, the Board here perverted *Milchem* insofar as its decision was predicated in anywise upon a consideration of the content of James's conversation or the appearance of his conduct.

The cases relied upon by the Board, *see, e.g., N.L.R.B. v. Bostik Division USM Corp.*, 517 F.2d 971 (6th Cir. 1975), are not to the contrary. They simply make explicit what was implicit in *Milchem*. That is, where conversations are

of a much shorter duration than the one condemned in *Milchem, Milchem's* per se rule is not applicable, and it becomes necessary to make a case-by-case inquiry into the nature and effect of the conversations, which inquiry must be tempered by a sense of realism. *See also Century City Hospital,* 219 NLRB 52 (1975); *Helca Mining Co.,* 218 NLRB 61 (1975). *Compare Pastoor Bros. Co.,* 223 NLRB 451 (1976), and *Volt Technical Corp.,* 176 NLRB 832 (1969).

The purported distinctions between *Milchem* and the present case advanced by the Board to justify the result here vanish upon close examination of the facts which existed in *Milchem.* Here, the Board found that James and Thomas were intermittently joined in their conversation by other voters; thus, theirs was not a "one-to-one" conversation. Similarly, the evidence in *Milchem* was that the union representative spoke to "several" employees waiting to vote, not just one. Moreover, the offender in *Milchem* was, as in the case at bar, removed a "few feet" from his intended audience. Even were the distinctions drawn in this case real rather than imaginary, they could hardly suffice to avoid the consequences of *Milchem* without eviscerating the rule there set forth.

We stress that we do not here pass upon the wisdom of the *Milchem* rule; our function is merely to test the fairness of the Board's application of its own standard in the case before us. For the reasons stated above, we hold that the Board's application of its rule was not reasonably consistent with *Milchem* or with its subsequent decisions. Therefore, the Exchange's petition for review is granted, the Board's application for enforcement is denied, and the Board's certification of the Union is vacated.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

241 NLRB No. 158

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 13-CA-18121

MIDWEST STOCK EXCHANGE, INCORPORATED,
MIDWEST CLEARING CORPORATION,
MIDWEST SECURITIES TRUST CO., and
MIDWEST STOCK EXCHANGE SERVICE CORPORATION

and

OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION,
LOCAL 28, AFL-CIO

DECISION AND ORDER

Upon a charge filed on October 16, 1978, by Office and Professional Employees International Union, AFL-CIO, herein called the Union, and duly served on Midwest Stock Exchange, Incorporated, Midwest Clearing Corporation, Midwest Securities Trust Co., and Midwest Stock Exchange Service Corporation, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 13, issued a complaint and notice of hearing on November 22, 1978, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge, complaint, and notice of hearing before an Administrative Law Judge were duly served on the parties to this proceeding.

The complaint alleges in substance that on September 29, 1978, following a Board election in Case 13-RC-14526 the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit

found appropriate;[1] and that, commencing on or about November 10, 1978, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On December 4, 1978, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On December 28, 1978, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on January 18, 1979, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to Notice to Show Cause.[2]

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

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[1] Official notice is taken of the record in the representation proceeding, Case 13-RC-14526, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), *enfd.* 388 F.2d 633 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), *enfd.* 415 F.2d 26 (5th Cir. 1969); *Intertype Co.* v. *Penello*, 269 F.Supp. 573 (D. C. Va., 1967); *Follett Corp.*, 164 NLRB 378 (1967), *enfd.* 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

[2] Respondents response in part requests that the Board reconsider its decision in the underlying representation case. To the extent that Respondent's response may be considered a motion for reconsideration it is denied as not raising any issues not previously considered by the Board.

In its answer to the complaint and response ot the Notice to Show Cause, Respondent in substance contends that the certification is invalid for the reasons stated in its objections to the election and exceptions to the Hearing Officer's Report on Objections and Recommendations.

A review of the record in the representation proceeding, Case 13-RC-14526, discloses that an election directed by the Regional Director was held on January 26, 1978, and won by the Union. Respondent filed timely objections to conduct affecting the results of the election which, in substance, alleged that (1) the National Labor Relations Board agents conducting the election wrongfully denied Respondent's request to extend polling hours, (2) the Union's election observer unlawfully engaged in electioneering at the polls, (3) the Board agents improperly supervised the election, (4) agents of the Union interfered with the employees' free choice by acts of coercion and, by challenging voters on frivolous grounds, and (5) the Board unlawfully discouraged certain employees from filing unfair labor pracice charges.

The Regional Director issued his Supplemental Decision on March 16, 1978, overruling all of Respondent's objections except the one pertaining to the electioneering of the Union observer during the voting period and the failure of the Board agent to prevent it, and ordered a hearing on this objection. Respondent did not file exceptions. On May 5, 1978, the Hearing Officer issued her Report on Objections and Recommendations, in which she recommended that Respondent's objection be overruled, on the ground that the conversations of the union observer with employees were merely brief, innocuous exchanges and did not involve the appearance of electioneering, and the observer's performance of child care services was only a courtesy performed in response to a request. Respondent filed exceptions to the Hearing Officer's report. The Board, on September 29, 1978, in an unpublished decision, adopted the Hearing Offi-

cer's report and certified the Union as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[3]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

Findings of Fact

I. The Business of Respondent

Midwest Stock Exchange, Incorporated, Midwest Clearing Corporation, Midwest Securities Trust Co., and Midwest Stock Exchange Corporation, are affiliated businesses with common owners, directors, control, location, and a common labor relations policy, and constitute a single employer and an integrated business enterprise engaged in

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[3] See *Pittsburgh Plate Glass Co.* v. *N. L. R. B.*, 313 U. S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

commerce within the meaning of Section 2(6) and 2(7) of the Act. Respondent has an office and place of business in Chicago, Illinois, where it provides facilities and services for individuals engaged in the business of purchasing and selling certain securities and options. During a representative 12-month period, Respondent, in the course and conduct of its business operations, serviced securities with shares having a combined value of over $500,000 which were purchased and sold at Respondent's facility, and serviced securities with shares having a combined par value of over $50,000 which originated outside the State of Illinois and were purchased and sold at Respondent's Illinois facility.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. The Labor Organization Involved

Office and Professional Employees International Union, Local 28, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practice

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All employees of the Employer at its facilities currently located at 120 South LaSalle Street and 640 North LaSalle Street, Chicago, Illinois, as specifically included in Appendix B attached hereto, but excluding those specifically excluded in said Appendix B, all professional employees, guards and supervisors as defined

in the Act, as amended, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

2. The certification

On January 26, 1978, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 13 designated the Union as their representative for the purpose of collective bargaining with Respondent. The Union was certified as the collective-bargaining representative of the employees in said unit on September 29, 1978, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request to Bargain and Respondent's Refusal*

Commencing on or about October 5, 1978, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about November 10, 1978, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since November 10, 1978, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in section III, above, occurring in connection with its operations described

in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit, and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F. 2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F. 2d 57 (10th Cir. 1965).

The Board upon the basis of the foregoing facts and the entire record, makes the following:

Conclusions of Law

1. Midwest Stock Exchange, Incorporated, Midwest Clearing Corporation, Midwest Securities Trust Co., and Midwest Stock Exchange Service Corporation, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Office and Professional Employees International Union, Local 28, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All employees of the Employer at its facilities currently located at 120 South LaSalle Street and 640 North LaSalle Street, Chicago, Illinois, as specifically included in Appendix B attached hereto, but excluding those specifically excluded in said Appendix B, and all professional employees, guards and supervisors as defined in the Act, as amended, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since September 29, 1978, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about November 10, 1978, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Midwest Stock Exchange, Incorporated, Midwest Clearing Corporation, Midwest Securities Trust Co., and Midwest Stock Exchange Service Corporation, Chicago, Illinois, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Office and Professional Employees International Union, Local 28, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit as set forth in Appendix B attached hereto.*

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its facilities in Chicago, Illinois, copies of the attached notice marked "Appendix A." Copies of said notice on forms provided by the Regional Director for Region 13, after being duly signed by Respondent's repre-

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* [Ed. Note: Appendix B to this Decision and Order, which has not been reproduced herein, is identical to the unit description set forth at pp. 14-23 below.]

sentative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 13, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

Dated, Washington, D.C. April 24, 1979.

.....
John H. Fanning, Chairman

.....
Howard Jenkins, Jr., Member

.....
John A. Penello, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

FJP

Chicago, IL

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 13-RC-14526

MIDWEST STOCK EXCHANGE, INCORPORATED,
MIDWEST CLEARING CORPORATION,
MIDWEST SECURITIES TRUST CO., and
MIDWEST STOCK EXCHANGE SERVICE INCORPORATED,
Employer,

and

OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION,
LOCAL 28, AFL-CIO,
Petitioner.

DECISION AND CERTIFICATION OF REPRESENTATIVE

Pursuant to authority granted it under Section 3(b) of the National Labor Relations Act, as amended, a three-member panel has considered the objection to an election held January 26, 1978,[1] and the Hearing Officer's Report recommending disposition of same. The Board has reviewed the record in light of the exceptions and briefs and hereby adopts the Hearing Officer's findings and recommendation.

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[1] The election was conducted pursuant to a Stipulation for Certification Upon Consent Election. The tally was: 182 for and 149 against, the Petitioner; there were 28 challenged ballots, the resolution of which by stipulation of the parties was approved by the Regional Director. The Employer filed 5 objections to conduct affecting the results of the election. The Regional Director issued a Supplemental Decision on Objections overruling objections 1, 3, 4, and 5 and ordering a hearing on objection 2. No exceptions were filed to the overruling of objections 1, 3, 4 and 5.

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid ballots have been cast for Office and Professional Employees International Union Local 28, AFL-CIO and that, pursuant to Section 9(a) of the Act, the foregoing labor organization is the exclusive representative of all the employees in the following appropriate unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment:

All employees of the Employer at its facilities currently located at 120 South LaSalle Street and 640 North LaSalle Street, Chicago, Illinois as specifically included below, but excluding those specifically excluded below, all professional employees, guards and supervisors as defined in the Act as amended.

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John H. Fanning, Chairman

.....
Howard Jenkins, Jr., Member

.....
John A. Penello, Member

NATIONAL LABOR RELATIONS BOARD

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Thirteenth Region

Case No. 13-RC-14526

MIDWEST STOCK EXCHANGE, INCORPORATED,
MIDWEST CLEARING CORPORATION,
MIDWEST SECURITIES TRUST CO., and
MIDWEST STOCK EXCHANGE SERVICE CORPORATION
Employer

and

OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION,
LOCAL 28, AFL-CIO
Petitioner

HEARING OFFICER'S REPORT AND RECOMMENDATIONS ON AN OBJECTION TO CONDUCT AFFECTING THE RESULTS OF ELECTION

Pursuant to a petition filed on September 12, 1977 and a Decision and Direction of Election issued on December 15, 1977, an election by secret ballot was conducted under the direction and supervision of the Regional Director on January 26, 1978.[1]

The results of the election, as set forth in the amended tally of ballots issued on February 24, showed that of approximately 386 eligible voters, 182 cast ballots for and 149 cast ballots against Petitioner. There were 28 challenged ballots, the resolution of which by stipulation of the parties was approved by the Regional Director.

Thereafter, on February 2, the Employer filed timely objections to conduct affecting the results of the election, a copy of which was duly served on the Petitioner.

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[1] Hereafter, all dates refer to 1978.

Following an investigation of the issues raised by the objections, the Regional Director, on March 16, issued a Supplemental Decision on Objections, overruling objections Nos. 1, 3, 4 and 5, and ordering that a hearing be held to resolve the issues raised by objection No. 2.

Pursuant to the notice of hearing served on the parties, a hearing was conducted April 4 and 5 in Chicago, Illinois. Full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing on the issues was afforded to all parties. Both parties submitted briefs, which have been duly considered.

The findings of fact and credibility resolutions contained herein are based upon my consideration of the entire record and upon my observations of the testimony and demeanor of the witnesses. Accordingly, any failure to completely detail all conflicts in evidence does not mean that such conflicting evidence was not considered.[2]

Objection No. 2:[3]

> A Union pollwatcher unlawfully engaged in electioneering while the polls were open in the corridor immediately outside the polling area and along the line of march to the polling place.

Evidence:

The Employer's objections concern only one of the polling places. This site was located on the twelfth floor of a building which housed eligible voting departments on various floors.

The voting booths and check-off table were located in a small room staffed by several Board Agents as well as two

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[2] *Bishop and Malco, Inc. d/b/a Walkers*, 159 NLRB 1159.

[3] Following the specific objection, the Employer included two pages of supporting text, which can be found in the Board's Exhibit 1(a).

observers for each party. Prospective voters waited in lines stretching down the narrow corridor outside of the voting room. The corridor was policed by one or more Board Agents, and a third observer for each party was also stationed in the corridor. Chairs for use by the observers were placed along the corridor facing the line.

Although there is no evidence that a specific polling area with "no electioneering" limits was delineated, no Board Agents or observers were stationed in areas away from the voting room or corridor.

Apparently, about half of the total eligible employees voted at this site, most of them (a Board Agent estimated 175) voting during the first half of the 4-hour voting period. Although witnesses testified that there were times when there was no line of voters, for the most part, the line consisted of from 5 to 20 voters.

All of the alleged objectionable incidents concern the conduct of Petitioner's observer Jonathan James, who was stationed in the corridor with the line of voters. Testimony on incidents allegedly happening in this corridor was supplied through the Employer's observer stationed in the hallway, Sonja Griffin, as well as through other unit employees, and through Board Agents assigned to the election. To support its objection regarding alleged incidents "along the line of march to the polling place" the Employer presented the testimony of Personnel Manager Ray Vaitenas, who was stationed during the election in the building's first floor lobby, where the incidents were supposed to have occurred. James testified on all alleged incidents.

All of the witnesses gave the appearance of testifying in honest reflection of their memories, Sonja Griffin and voter Lynn Douglas impressing me as particularly careful witnesses. Nevertheless, the record offers many contradictions and inconsistencies, arising especially when comparing the testimony of James with that of the other witnesses.

After a close review of James' testimony and demeanor, I cannot conclude that he deliberately altered his testimony to further the Petitioner's position. In fact, there is one instance where he candidly related an entire conversation, revealing facts detrimental to the Petitiner's case beyond those already presented by the Employer (Tr. 257). Rather, it appears that James was merely not as careful or cautious as the others in his attempt to present the facts in his memory. This resulted in much confusion and many inconsistencies in his own testimony. For example, James initially testified to a vague or absent recollection of the circumstances surrounding Douglas' voting. In later testimony, his recollection suddenly cleared, and he recalled precisely how many voters stood in line with Douglas (Tr. 275, 293, 295 and 318). In trying to place an exact time on a certain discussion, James alternated several times between confusion and definitude (Tr. 260-261 and 292). Steady questioning prompted a change in his recollection of how many voters with whom he shook hands (Tr. 274 and 304). Under cross-examination, James rendered two precisely opposite versions of his recollected interpretation of instructions from a Board Agent (Tr. 284 and 286). Similarly, he contradicted his own prior testimony in describing the content of a Board Agent's statement to him about a "closed election" (Tr. 271 and 282). Additionally, and significant to the issues of this case, James admitted an absence of recollection of events that "could have" occurred between himself and voters during the election (Tr. 290-91, 302 and 312).

On the basis of the foregoing, I choose to discredit the testimony of James in areas where any contradicting testimony exists. Therefore, I conclude that the following incidents occurred during the election in question.

Although Board Agents stationed in the corridor outside the voting room repeatedly informed voters that the observers were not allowed to speak with them, continually

throughout the election both Griffin and James were greeted and spoken to by voters waiting in line. Both returned greetings and briefly answered questions about their presence at the polling area. Having been warned at the preelection conference to "keep the conversation to a minimum," however, James and Griffin discouraged further conversation with voters, diverting them verbally and with gestures.

Griffin apparently had more success in the endeavor, as the evidence shows that she had only one conversation in the polling area that progressed beyond mere greetings. She was approached by her roommate (not in the area as a voter) who wanted to discuss temporary lodgings because of the snow emergency. Griffin continued and concluded the conversation only after having obtained the permission of the Board Agent to do so.

Contrastingly, James became involved in several exchanges with voters which progressed beyond mere greetings. Indeed, Jams even initiated some of the conversations. His activity was noticed by Board Agent Walter Hoffman, who cautioned James more than once to "cut his conversation short." Hoffman estimated that on perhaps six occasions he had to remind James that he could not be beyond greetings with voters. However, not every one of these warnings was prompted by James' actually having overstepped the bounds. In response to one caution from Hoffman to restrict conversation, James told Hoffman that he did not think he could do as requested, since it would be impolite not to speak to his friends. There is no evidence suggesting that the subject of the election, the Union, or the Employer's position was discussed during any of these conversations between James and voters in line.

The first conversation occurred about ½ hour after the polls opened. Both James and Griffin were seated facing the voting line, which consisted of at least five and perhaps twenty persons. A voter in line, Jerri Thomas, greeted

James with "What's happening?" He replied, "Nothing." Thomas thereafter asked him what he was doing there, and he explained that he was an observer. He then asked her what she had done the previous night, and inquired why she had her little girl with her. (Due to school closings, Thomas' 4-year old daughter accompanied her mother to work that day.) Thomas replied that she would be taking her child home and probably returning to work later. Thomas then asked James whether he would watch the girl while she went in to vote. James said "Yes," and Thomas commented that she would be right back. Griffin estimated that the entire conversation lasted 5 minutes. During this time, Thomas also conversed with other voters, and James was greeted by an unidentified voter.

Until her mother returned from the voting room, the child then stayed with James, sitting on his lap for awhile. The two of them chatted and played with a toy bank containing a few cents. Voters remarked on the child, although not directly to James. When Thomas returned, she took her daughter, telling James, "I'll see you later. Thank you." James responded, "Goodbye. Are you going home?" Thomas answered "Yes," and nothing further was said between them. Although a Board Agent was present in the corridor during these events, he did not become involved in any way.

The next incident occurred at around 1 p.m., an hour into the voting time. James and Griffin were seated, facing a line of about 15 voters. A young man (identified only as a work-study employee) joined the voting line, greeted James, and then began talking to James about work. The exact subject of his comments is not known. The young man talked with two or three other voters as well, and then began laughing and cracking jokes with James and other voters. James testified that the man was asking him about Griffin, commenting favorably on her looks, and that the other voters joined in and teased the young man as well.

There is no other evidence revealing the subject of the joking. During this time, the young man also asked James what he was doing there, and James responded that he was an observer. After 3 to 5 minutes, the incident ended with the intrusion of the Board Agent, who came over to ask James to "cut his conversations short" and to tell the voters to keep the corridor quiet. Thereafter, the voters just talked among themselves, and James was not further involved.

Sometime during the next 45 minutes, three voters, identified as Wendell, George and Tom Prentiss, came to the polling area. Upon their arrival, they greeted James, who was seated, and each shook hands with James. One said he was up there to vote, and James pointed to the line. They then joined the line and proceeded without further incident to the voting room. When they finished voting, they waited directly outside of the polling room. Board Agent Hoffman told them they could not loiter, and they moved on, walking past the two observers to the water fountain a few feet beyond. There they stopped. James got up and walked to the water fountain. He talked with the three men for a "minute or less" when Hoffman interrupted, telling the voters they could not loiter, and reminding James to cut his conversations short. The line consisted of about 10 to 15 voters throughout this incident.

At around this same time, another incident occurred involving a group of employees. Voter Lynn Douglas observed a "loud, noisy group" of 7 or 8 predominantly female employees get into line behind her. The unidentified voters commented on the decor and the pictures on the wall. James, who had been standing against the opposite wall, near his chair, walked across the corridor. James leaned over and whispered to a female member of the group, saying "more than one or two words but it was not an extended" discussion. Douglas does not recall a reply by any voter, nor did she hear the subject of the whispering.

James then stepped back to his former position. There were 4 or 5 other voters in line ahead of Douglas. There is no indication that a Board Agent became involved in the incident.

In another incident, a female voter, after having voted, walked past James' chair as she left the polling area. As she did so, he patted her on the posterior and said, "Hello." She asked, "What are you doing up here?," and he replied that he was an observer. Nothing further was said. There were about ten persons in the voting line at the time.

Sometime during the first 2 hours of the polling period, James asked Hoffman whether observers could take a lunch break. Hoffman replied that it was allowed. At approximately 2 p.m., James left the polling area without Hoffman's knowledge. He took the elevator to the first floor lobby, and then took the stairway to the basement, which houses several unit departments as well as employee lockerrooms and rest rooms. James went to the lockerroom to get his coat and other belongings. While in the men's room he removed his observer badge and put it in his pocket. James had not been instructed to leave his badge at the polling place. He did not display his badge again until his return to the twelfth floor.

James then left the building for a nearby bank and, upon his return, purchased a lunch at a concession in the first floor lobby. He talked to a group of about three unit employees in the lobby, putting his arm around a female employee. It is not known what was discussed, but the conversation lasted about 3 minutes. Thereafter, all of them left the lobby, using the elevators.

The incident, witnessed by Personnel Manager Vaitenas, was reported to the Employer's attorney, who then related it to the agents conducting the election. Shortly after James' return to the polling area, he was spoken to by

Board Agent Carl Tominberg about the incident. Tominberg told James he had heard complaints about James' talking to voters. He asked James not to have any conversation with voters. When James responded that he did not know if he could do that, Tominberg instructed him to do his best. Apparently, the election proceeded to its conclusion without further incident.

Analysis:

In *Milchem, Inc.*, 170 NLRB 362, the Board prohibited sustained and prolonged conversation between agents of parties to the election and voters waiting to cast their ballots. Such activity, regardless of the content of the convention, was found to be a basis for setting aside an election. Intending the proscription to be "a preventive device to enforce the ban against electioneering," the Board hoped that it would not only eliminate the possibility for the gaining of a last-minute advantage by either party, but that it would also protect the voter from distraction and intrusions upon his thoughts as he made an important decision.

Nevertheless, at the same time that the Board announced its prohibition of conversation between agents and voters in the polling area, it limited somewhat the strictness of that standard. Not every "chance, isolated, or innocuous comment or inquiry" by an agent would be sufficient to trigger a finding of objectionable conduct. The conclusion in a subsequent case, *Century City Hospital*, 219 NLRB 52, has borne out the Board's stated intention not to become concerned with trifles on this issue.

Even though James spoke to voters in the corridor to an extent beyond a mere exchange of greetings, the mild nature of his activity holds it outside the bounds of the *Milchem* proscription. I conclude that it is not sufficient to warrant setting aside the election.

James did not engage in prolonged or sustained conversations with any voters in the polling area. Of the five in-

cidents presented, three amounted to brief exchanges between James and voters lasting a minute or less. These include his communication with the small group of voters behind Douglas, his visiting with three friends at the water fountain, and the incident involving his patting a female voter on the posterior. Two of these incidents involved employees who had already voted.

Likewise, the two lengthier conversations do not appear to be of the type banned by *Milchem* in order to protect voters and to prevent one party's gaining a last-minute advantage. James' conversation with Jerri Thomas was an exchange of pleasantries initiated by the voter when, upon her arrival, she did not see any other familiar faces. James' conversation with the work-study employee amounts to friendly banter, also initiated by the voter. Neither incident involved a one-to-one conversation: other voters took part at will. Moreover, neither set of circumstances even suggests the appearance of electioneering, the basis for the *Milchem* proscription of conversation.

The Employer alleges James' performance of child care services for Thomas to be objectionable conduct. The problem of observers offering or performing favors for voters was raised in *Modern Hard Chrome Service Co.*, 187 NLRB 82, where an election was set aside because an observer offered a voter money to buy himself a beer. In the instant case, James did not gratuitously offer his services to a voter, but rather agreed to perform the courtesy in response to the voter's request. Moreover, not every offer of a favor by an observer to a voter during the election has been found to be improper conduct. *William Pastoor and Ray Pastoor, a Co-Partnership d/b/a a Pastoor Bros. Company*, 223 NLRB 451, 453. I, therefore, conclude that James' performance of child care services for a voter during the election is not objectionable conduct.

James' activities in the first floor lobby, including conversations with voters, must also be considered. As an

observer, he was still an agent of the Petitioner at the time, although not outwardly identified as such. However, the site of these activities are beyond the *Milchem* restriction. The lobby is clearly outside of the polling area, and the employees were not waiting in line to vote. *Locust Industries, Inc.*, 218 NLRB 717. Even assuming that the employees with whom James talked in the lobby were on their way to the voting area, *Milchem* would not prohibit James' activities. In *Sterling Faucet Company, Texas Division, a Subsidiary of Rockwell Manufacturing Company*, 203 NLRB 1031, 1037, the Board held that union agents were allowed to electioneer "on the main aisle of the plant which employees would normally follow . . . to the polling place" without transgressing the *Milchem* rule. I, therefore, conclude that James' conduct in the lobby does not warrant setting aside the election in the instant case.

In its brief, the Employer claims that its objection No. 2 and the evidence brought forth in the hearing raise an allegation that Board Agent misconduct warrants setting aside the election. The text included with the original objection No. 2 alleges that:

> The Board's failure to properly insure that such electioneering (by James) would not occur also gives cause for a new election. Mr. James' conduct and the slack monitoring of hallway electioneering created an atmosphere around the polling area of strong union sympathy . . . .

As I have concluded that the underlying allegation of objectionable electioneering is without merit, I cannot but conclude that the Board Agents' alleged failure to control James' activities does not amount to misconduct warranting the setting aside of the election. Moreover, the evidence shows that the Board Agents made repeated attempts to curb James' questionable activities, with eventual success.

CONCLUSIONS AND RECOMMENDATIONS[4]

Based upon the findings of fact and credibility made herein and the principles of law discussed above, I recommend that the Employer's objection No. 2 be overruled. I further recommend that a Certification of Representative issue.

Dated at Milwaukee, Wisconsin this 5th day of May 1978.

/s/ Lois Benes Voelz
Louis Benes Voelz, Hearing Officer
National Labor Relations Board
Thirtieth Region
Suite 230, Commerce Building
744 North Fourth Street
Milwaukee, Wisconsin 53203

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[4] Under the provisions of Section 102.69 of the Board's Rules and Regulations, exceptions to the report must be received by the Board in Washington, D. C. by May 18, 1978. Immediately upon the filing of exceptions, the party filing same shall serve a copy with the Regional Director. If no exceptions are filed, the Board will adopt the recommendations of the Hearing Officer.

Sec. 9 of the Labor Management Relations Act, 29 U.S.C. § 159—

Sec. 9.

(a) Exclusive representatives; employees' adjustment of grievances directly with employer.

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective bargaining representative has been given opportunity to be present at such adjustment.

(b) Determination of bargaining unit by Board.

The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided,* That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of

the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

(c) Hearings on questions affecting commerce; rules and regulations.

(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section;

the Board shall investigate such petition and if it has reasonable cause to believe that a question of repre-

sentation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued with respect to such labor organization or its predecessor not issued in conformity with section 10(c).

(3) No election shall be directed in any bargaining unit or any subdivision within which in the preceding twelve-month period, a valid election shall have been held. Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this subchapter in any election conducted within twelve months after the commencement of the strike. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) of this subsection (b) of this section the extent to which the employees have organized shall not be controlling.

(d) Petition for enforcement or review; transcript.

Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsection (e) or (f) of section 10, and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

(e) Secret ballot; limitation of elections.

(1) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8 (a) (3), of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit and certify the results thereof to such labor organizations and to the employer.

(2) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

Supreme Court, U. S.
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No. 80-121

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION LOCAL 28, AFL-CIO,

Petitioner,

vs.

MIDWEST STOCK EXCHANGE, INCORPORATED; MIDWEST CLEARING CORPORATION; MIDWEST SECURITIES TRUST COMPANY; AND MIDWEST STOCK EXCHANGE SERVICE CORPORATION,

Respondents,

and

NATIONAL LABOR RELATIONS BOARD,

Party in Interest.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION.

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QUESTION PRESENTED FOR REVIEW

The "Question Presented" by Petitioner (Pet. i) does not reflect the facts of this case or the proceedings below. Contrary to Petitioner's assertion, the Court below did not invalidate an election that was "the fair and free choice of the voters". That Court accepted, in full, the Board's findings of fact concerning the election, but found that under the Board's own applicable standard of election conduct, the election was not conducted under the "laboratory conditions" required by the Board's interpretation of the National Labor Relations Act. *General Shoe Corporation,* 77 NLRB 124 (1948); *Milchem,* 170 NLRB 362 (1968). The Court did not substitute its judgment for the Board's, but instead found that by certifying the results of the election, the Board had not been reasonably consistent with its previous decisions in the application of its own standard. *Celanese Corp.* v. *American* v. *NLRB,* 291 F. 2d 244 (7th Cir. 1961).

Here the Board found, and the Union does not dispute, that the Union's official election observer engaged in a series of interactions with employees waiting to vote, including two conversations each of which lasted as long as five minutes. The Board had previously prohibited such conversations under identical circumstances on the grounds that they undermined the "laboratory conditions" necessary for a fair and free election, and set aside the results of the election where such activity did occur. *Milchem, Inc.,* 170 NLRB 362 (1968). Thus, by the Board's own standards, as the Court found, the election at the Exchange could not be considered fair and free.

By insisting that the election at the Exchange *was* a valid election under the Act, Petitioner in fact objects to the Board's *Milchem* standard of election conduct, rather than any decision

of the Court below. The *Milchem* standard was designed by the Board, in the exercise of its Congressionally mandated expertise, to safeguard the fair and free choice of bargaining representatives by employees and thus was well within the Board's wide discretion to regulate elections. *NLRB* v. *A. J. Tower Co.*, 329 U. S. 324, 330-1 (1946). Moreover, since the propriety of the *Milchem* rule was not challenged before the Board or the Court below, it cannot be properly raised for the first time now.

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No. 80-121

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Respondents,

and

NATIONAL LABOR RELATIONS BOARD,

Party in Interest.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

STATEMENT OF THE CASE

The Union's Petition does not raise any material issues of fact. Nonetheless, Respondents ("the Exchange") present a separate Statement of the Case in order to correct certain misconceptions of fact that may arise from the Statement in the Petition. Inaccuracies in the Union's Statement concerning the

Board's *Milchem* rule and the Court's review of the Board's application of the *Milchem* rule to the facts in this case, are also discussed herein.

This case arose from a representation election conducted by the Labor Board among some of the Exchange's employees. The final tally of ballots showed that the Union won the election by a vote of 182 to 149. (App. 2a.)

The Exchange filed timely objections to the conduct of the election and to conduct affecting the election results, alleging primarily that misconduct by Union election observer James both at and away from the polling area, and the Board agents' failure to prevent that misconduct, interfered with the "laboratory conditions" necessary to a fair election. The Labor Board held a hearing to resolve these issues.[1] (App. 2a.)

The Board's Hearing Officer subsequently issued a "Report and Recommendations on an Objection to Conduct affecting the Results of Election". (App. 23a-34a.) The Hearing Officer credited the Exchange's principal witnesses, observer Sonja Griffin and employee Lynn Douglas, over Union observer James, and found the facts concerning James' misconduct and the Board agents' failure to prevent that misconduct to be as the Exchange contended. Notwithstanding these findings, the Hearing Officer concluded that the conduct of the Union observer and the Board agents was not sufficient as a matter of law to set aside the election. In particular, the Hearing Officer found that the observer's misconduct did not violate the Board's *Milchem* rule against conversations between an observer and employees waiting to vote. (App. 31a.) The Exchange filed Exceptions to the Hearing Officer's Report, but the Board summarily affirmed without opinion the Hearing Officer's Report and cer-

1. Contrary to the Union's statement (Pet. 3), the Exchange's objection and the Labor Board hearing were not limited to James' misconduct. It should also be noted that the Exchange's objection consisted of two pages of text, in addition to the single sentence quoted at Pet. 3.

tified the Union as the exclusive bargaining representative in the unit on September 29, 1978. (App. 21a-22a.)

In order to challenge what the Exchange believed to be gross errors in the Board's Decision, and in the underlying Hearing Officer's Report, the Exchange subsequently refused to bargain with the Union on the ground that the election results, and the Board's certification of the Union as exclusive bargaining representative on the basis of those results, were invalid. The Board summarily ruled that the Exchange's contentions had been previously adjudicated and overruled, found that the Exchange had engaged in an unfair labor practice, and ordered the Exchange to bargain with the Union. (App. 11a-20a.)

The Exchange then petitioned for review to the Court of Appeals for the Seventh Circuit, and the Board cross-appealed for enforcement of its order.[2] On review, the Court below adopted the Board's findings of fact, and accepted the Board's determination that its *Milchem* standard was the controlling rule of election conduct. However, the Court concluded that Union observer James' misconduct was identical to the conduct that caused the election to be set aside in *Milchem*. The Board's refusal to invalidate the election in this case was thus so inconsistent with the Board's election standard announced in *Milchem*, that the Board had either unreasonably misapplied *Milchem* or impermissibly altered its established policy without notice or explanation.[3] For this reason, the Court below refused to enforce the Board's order and vacated the Board's certification of the results of the election.

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2. The Union was permitted to intervene, and participated fully in the briefs and oral argument to the Court below.

3. The Court found it unnecessary to consider the Exchange's objections to observer James' conversations with voters away from the voting area and the Board agents' failure to prevent James' misconduct. These objections are not in issue in the Petition.

From this decision and order, the Union has petitioned for certiorari. The Board has not joined in the Petition, nor filed a Petition of its own.

In order to evaluate the proceedings below, and the Petition now before this Court, it is necessary to understand the Board's *Milchem* standard of election conduct. That standard, which was designed to preserve the integrity of the Board's election processes, was deemed controlling by the Hearing Officer, the Board and the Seventh Circuit in the proceedings below. It has never been overruled by the Board, or criticized by any Court.

In *Milchem, Inc.*, 170 NLRB 362 (1968) a Union representative stood for about five minutes near fifteen employees waiting in line to vote, engaging several of them in conversation. The only evidence as to the content of these conversations was that the representative's remarks "concerned the weather and like topics". *There was no evidence concerning the actual impact of these conversations on employees waiting to vote.* Nonetheless, the Board held that "the sustained conversations [of a party's representative] with prospective voters waiting to cast their ballots, regardless of the content of the remarks exchanged, constitutes conduct which, in itself, necessitates a second election". *Milchem, supra,* 170 NLRB at 362. Whether the conversations between a party and prospective voters consisted of electioneering was irrelevant; they were prohibited. Explaining the basis for this "blanket prohibition" of such conversations, the Board observed, *id.* (emphasis added):

> "Careful consideration of the problem now convinces us that *the potential for distraction, last-minute electioneering or pressure, and unfair advantage* from prolonged conversations between representatives of any party to the election and voters waiting to cast ballots is of sufficient concern to warrant a strict rule against such conduct, without inquiry into the nature of the conversations."

Thus, although the Union suggests that the Board intended *only* to prevent electioneering (Pet. 6), the Board in fact in-

tended the *Milchem* "strict rule" to avoid even the *potential* for distraction of voters and unfair advantage as well. Because of the grave difficulty of "recapturing with any precision the nature of the remarks made in the charged atmosphere of a polling place," and because "a blanket prohibit against such conversations is easily understood and simply applied," the Board prohibited the conversations regardless of their content. Where such conversations occurred, the election was so tainted that it would be set aside. This rule protected the rights of all participants—voters, unions and employers—to fair and regular elections. *Accord, Modern Hard Chrome Service Co.*, 187 NLRB 82 (1970); *Volt Technical Co.*, 176 NLRB 832 (1969).[4]

In the case below, the Hearing Officer found that the facts were largely as the Exchange alleged. The crucial facts found by the Hearing Officer were as follows:

1. During the first half-hour of the election period, Union observer James spoke with employee Jerri Thomas for five minutes while she was waiting to vote, in the presence of ten to fifteen other waiting voters. (App. 3a-4a.)

2. When employee Thomas went into the voting room, observer James babysat with Thomas' four year old daughter, chatting and playing with her as she sat on his lap. Throughout this time, James and the little girl were within a few feet

4. To be sure, the Board did place one qualification on its "blanket prohibition": not every "chance, isolated, innocuous comment or inquiry by an employer or union official to a voter will *necessarily* void the election". 170 NLRB 363 (emphasis added). Only where the comments are far shorter than those condemned in *Milchem*, does the Board inquire into their nature and effect. *Cf. NLRB* v. *Bostik Division, USM Corp.*, 517 F. 2d 971 (6th Cir. 1975); *Century City Hospital*, 219 NLRB 52 (1975); *Hecla Mining Co.*, 218 NLRB 61 (1975). This is precisely the "bifurcation" of the *Milchem* rule that the Union considers to be a unilateral creation of the Court below. (Pet. 10.) As we shall demonstrate, the Court correctly found that James' conduct was not within this *de minimus* exception.

of the line of voters, some of whom spoke to or about the child. The Hearing Officer had tried to minimize James' misconduct by finding that the babysitting lasted only "awhile" but the Court correctly observed that the witnesses' estimates ranged from "five" to "fifteen to twenty" minutes.[5] (App. 4a.)

3. One hour after the voting period began, James joked with a prospective voter for three to five minutes in full view of fifteen other employees waiting to vote, stopping only when Board agent Hoffman finally admonished him. (App. 3a.)

4. Sometime during the following 45 minutes, James said hello and shook hands with three voters who had come into the polling area together, in the presence of ten to fifteen waiting employees. After the men had voted, James followed them to the water cooler a few feet beyond the observers' chairs, stood talking to them at the water cooler for "a minute or less" in the presence of ten to fifteen voters, again stopping only when Board agent Hoffman intervened and told James again to limit his conversations with voters. (App. 3a.)

5. On another occasion James left the chair where he had been stationed as an official observer, walked over to a group of seven or eight employees waiting to vote, and whispered to the group for half a minute while the voting line consisted of ten to fifteen prospective voters. (App. 3a.)

6. James engaged in these conversations with voters in disregard of instructions and repeated warnings from Board agent Hoffman.[6]

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5. In fact, James himself testified that he babysat for about twelve minutes. The longer estimate was that of Griffin, whom the Board had credited as a "particularly careful" witness. Although the Court refrained from injecting this fact into the Hearing Officer's opinion, it is apparent that the longer estimates are more accurate. However, this point is not necessary to the Petition.

6. The Hearing Officer also had found, in contrast, that the Exchange's observer Sonja Griffin, took the Board agents' instruc-

(Footnote continued on next page.)

These are the facts that are material to this case.[7]

On the basis of these facts, which were precisely as the Exchange alleged, the Hearing Officer found and the Labor Board agreed that Union observer James' conversations and babysitting did not violate the Board's *Milchem* prohibition against conversations between a party's observer and employees waiting to vote. On review, however, the Seventh Circuit strongly disagreed.

It must be emphasized that in reaching a conclusion contrary to the Board, the Court accepted the Board's *Milchem* standard and also its determination that *Milchem* controlled the present case. Further, the Court also expressly accepted the facts found by the Hearing Officer and adopted by the Board. See p. 3 above. The Court's sole inquiry was whether the Board had applied its own *Milchem* rule fairly and reasonably consistently with its previous decisions. App. 6a-7a; *accord, Celanese Corp. of America* v. *NLRB*, 291 F. 2d 224, 225 (7th Cir. 1961).

In its analysis, the Court summarized *Milchem* as follows, App. 7a-8a:

(Footnote continued from preceding page.)
tions seriously and scrupulously requested permission before discussing with her roommate their transportation problems created by the snow storm going on at the time. (App. 27a.) However, because the Hearing Officer did not consider James' conduct improper she found that the Board agent had fulfilled their duties, without carefully considering the evidence of their attempts and failures to prevent James' conduct. Because the Court also found it unnecessary to consider the Board agents' conduct as a separate ground for invalidating the election, we do not reach this issue here.

7. The Court found that James' five minute conversation with voter Thomas was alone a sufficient indication that the Board had applied its own standard improperly. It was thus unnecessary for the Court to consider the Hearing Officer's findings concerning James' unsupervised conversations with employees away from the polling area, and those findings are not repeated here.

> "The Board reaffirmed its commitment to insure the integrity of the election process when, in *Milchem, supra,* it declared that elections would be overturned where representatives of any party to the election engaged in 'prolonged' conversations with voters waiting to cast their ballots, regardless of the content of the remarks exchanged. 170 NLRB at 362. The Board reasoned that the potential for distraction, last minute electioneering, and unfair advantage, justified a 'strict rule' against such conduct, without requiring an examination into the substance or effect of the conversations. *Id.* Recognizing the impossible task of eliminating all conversations in the polling area, the Board stated that its rule would not necessarily void elections upon the occurrence of 'any chance, isolated, or innocuous comment'. *Id.* at 363. Without defining the point at which a 'trifling' comment becomes a prolonged conversation, the Board set aside an election where a union representative had engaged in an estimated five minutes conversation."

The undisputed facts showed that the conversation between Union observer James and employee Thomas also lasted approximately five minutes and was identical in kind to the conversation prohibited in *Milchem.* Consequently, the Court could not uphold the Board's conclusion that the *Milchem* standard was not violated because James' conversations were not "prolonged".[8]

The Court also found that the other purported "distinctions" between the conduct in *Milchem* and James' conversation, cited by the Board to justify its decision, were not distinctions at all, and were irrelevant to the Board's stated rules. Thus, the Board's finding that James' conversations did not violate *Milchem*

8. The Union contends that the Court below gave too much weight to Griffin's estimate that the conversation lasted five minutes. However, that estimate was cited by the Board, which found Griffin to be a "particularly careful" witness. (App. 25a.) The Union's attempt for the first time in its Petition to overturn the Board's credibility determination is untimely and not a proper topic before this Court for review.

because they did not "even suggest the appearance of electioneering, the basis for the *Milchem* proscription of conversation" was a radical and illogical departure from *Milchem's* purpose and rationale. As the Court observed, the Board had determined in *Milchem* to prohibit conversations without inquiry into their substance or effect not only because of the potential for last-minute electioneering but also because of the potential for distraction of voters during the last few minutes before casting their votes. The Court concluded, App. 9a:

> "[T]he Board here perverted *Milchem* insofar as its decision was predicated in anywise upon a consideration of the content of Jame's conversation or the appearance of his conduct."

Similarly, the Board's attempt to distinguish from *Milchem*, James' conversation with voter Thomas, on the ground that the James-Thomas conversation was not a "one-to-one conversation" was at odds with the specific facts of *Milchem*. The *Milchem* conversation itself was *not* "one-to-one," yet it caused the election to be set aside. 170 NLRB 364.[9] Having carefully considered each of the Board's attempts to justify its departure from *Milchem*, the Court concluded that "the Board's application of its rule was not reasonably consistent with Milchem or with its subsequent decisions," refused to enforce the Board's bargaining order, and vacated the certification of the election results. (App. 10a.)

In sum, the Court did not overrule the Board's findings of fact, nor question the Board's authority to adopt the *Milchem* rule and to apply it in the present case. The Court merely reviewed the Board's decision to insure that the Board had applied its chosen standard of election fairly and with conduct reasonable consistently. Because Union observer James' mis-

9. Indeed, that James' conversations drew the attention of more than the single voter he was addressing logically increased, rather than decreased, the potential for distraction of voters, the very evil the *Milchem* rule was designed to avoid.

conduct was identical to that condemned in *Milchem*, and because the "distinctions" relied on by the Board to justify its inconsistent rulings were either illusory or antithetical to the Board's announced and unaltered policies, the Seventh Circuit held that the Board had not in this case correctly applied its chosen standard. Therefore, the Court refused to enforce the Board's order. Far from invalidating an election representing "the fair and free choice of the voters," the Court's decision insured that the Board's high standards of election conduct and fairness would be preserved. *Cf. General Shoe Corporation*, 77 NLRB 124 (1948).

ARGUMENT

Certiorari is unnecessary and inappropriate in the present case. The Seventh Circuit's decision not to enforce a Board order that is unreasonably inconsistent with the Board's stated, and unaltered, *Milchem* standard of election conduct was both correct and uncontroversial. The decision does not raise any issue that is a matter of conflict among the circuits, or of sufficient public importance to merit consideration by this Court, and the Petition should therefore be dismissed.

I.

THERE IS NO CONFLICT AMONG THE CIRCUITS CONCERNING THE BOARD'S DISCRETION TO PROMULGATE A STRICT RULE OF ELECTION CONDUCT AGAINST CONVERSATIONS BETWEEN A UNION OR EMPLOYER REPRESENTATIVE AND EMPLOYEES STANDING IN LINE WAITING TO VOTE

In its Statement of the "Question Presented" in its Petition, the Union assumes that the Seventh Circuit has invalidated a National Labor Relations Board election "which is the fair and free choice of the voters". This assumption, as explained in its Petition (Pet. 7-9), is a challenge to the Seventh Circuit's failure to consider whether the observer's conduct had any actual impact on a specific voter, or any demonstrable effect on the vote tally as a whole, before determining to invalidate the election. But the Seventh Circuit's decision was dictated by the *Milchem* standard, as announced and applied by the Board. It is the *Board*, not the Seventh Circuit, that has prohibited sustained conversations between observers and employees waiting

to vote without requiring "an examination into their substance and effect". 170 NLRB 362.[10]

Thus, the Union's real disagreement is with the Board's creation of the *Milchem* standard. However, this standard is well within the "wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees" that has been entrusted by Congress to the Board. *NLRB* v. *A. J. Tower Co.*, 329 U. S. 324, 330-1 (1946). In *A. J. Tower Co.*, this Court specifically endorsed the Board's strict rule against untimely voter challenges *even though the rule might result in an inaccurate reflection of the desires of eligible voters*, because of the counterbalancing potential for disruption of the electoral process without the rule, *Id.*:

> "The rule does not pretend to be an absolute guarantee that only those votes will be counted which are in fact eligible. *It is simply a justifiable and reasonable adjustment of the democratic process.*"

Accord, General Shoe Corp., 77 NLRB 124, 127 (1948).

As noted above, the Board carefully crafted the *Milchem* prohibition to avoid the grave potential for last-minute distraction of the sort specified, and to spare the parties and the Board the difficult task of investigating the actual content and effect of conversations during the critical moments before an employee voted. The *Milchem* rule was all the more reasonable because of the ease of administration and compliance: a party could avoid invalidating an election, merely by instructing its representatives not to violate the *Milchem* rule. Thus, there can be no serious

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10. This aspect of the Board's *Milchem* rule distinguishes this case from those cases, unnamed by the Union, which "involve threats and coercion in the voting process, . . . misrepresentation of facts by campaigners, and . . . fair procedures in the balloting process itself" in which, according to the Union, "reviewing courts almost always inquire as to whether the challenged conduct had an unfair or wrongful impact upon the free choice of voters". (Pet. 13.)

question that the *Milchem* creation of a "blanket prohibition" against conversations between a party's representative and employees in the voting line was a reasonable exercise of the Board's discretion to set formal standards of election conduct.

The Union protests that the Exchange's employees have lost their right to a "free and fair choice" of collective bargaining representative. But it is the *Board's* decision, in the proper exercise of its discretion, that an observer's potentially distracting prolonged conversation with waiting voters automatically impairs the fairness of the election, and that the danger of such conduct is so great that it must be flatly prohibited, without case-by-case determinations of the conduct's demonstrable effect on the election results. No court has questioned the validity of this *Milchem* rule. *Cf. Sonoco Products Co.* v. *NLRB*, 443 F. 2d 1334, 1337 (9th Cir. 1971); *NLRB* v. *Bostik Division, USM Corporation*, 517 F. 2d 971 (6th Cir. 1975). There is thus no conflict of judicial opinion for this Court to resolve.

Moreover, in the proceedings below, the Union did not ask either the Board or the Court to reconsider the validity of *Milchem*. To the extent that the Union seeks merely a modification of the Board's own discretionary standards, but has not yet made this request of the Board, this question is not of such public importance that it should be considered at this time by the Court. Thus, neither the Board's exercise of its discretion to regulate representation elections, its adoption of the strict *Milchem* standard, nor the reviewing court's application of the strict rule, warrant review by this Court.[11]

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11. The Union also appears to object to the "five-minute limit" which it contends was arbitrary and improperly imposed on observer conversations by the Seventh Circuit. (Pet. 7-8, 17-18.) But this objection manifestly does not reflect the Court's decision. The Court merely held that when the Board prohibited "prolonged" conversations, and included in that prohibition one five minute conversation, the Board could not later condone another five minute conversation under identical circumstances without explaining this readily apparent inconsistency.

II.

THE COURT BELOW PROPERLY APPLIED A LONG ESTABLISHED AND UNIVERSALLY ACCEPTED STANDARD OF JUDICIAL REVIEW TO THE BOARD'S DECISION

The question initially presented by the Union (Pet. i)—May a reviewing court invalidate a National Labor Relations Board representation election which is the fair and free choice of the voters solely because the court's interpretation of a Board rule of law is different from that applied by the Board?—appears to be a challenge to the standard of judicial review applied by the Seventh Circuit to the Board's decision. However, the question misrepresents the Court's decision. Although the Court certainly disagreed with the Board's application of *Milchem in this case*, the interpretation of the *Milchem* rule applied by the Court was precisely the interpretation applied by the Board in *Milchem* and subsequent decisions. The Court simply investigated whether the Board had applied its own *Milchem* rule to the facts found by the Board in a manner reasonably consistent with its previous decisions. This inquiry on review is in accord with the decisions of this Court and of the appellate courts.[12] *NLRB* v. *A. J. Tower Co., supra; Celanese Corp. of America* v. *NLRB, supra; Monmouth Medical Center* v. *NLRB*, 604 F. 2d 820, 823 (3d Cir. 1979); *Hometown Foods, Inc.* v. *NLRB*, 416 F. 2d 392, 395 (5th Cir. 1969); *Delta Drilling Co.* v. *NLRB*, 406 F. 2d 109 (5th Cir. 1969). *Cf. FTC* v. *Mary Carter Paint Co.*, 382 U. S. 46 (1965); *Greater Boston Television Corp.* v. *FCC*, 444

12. The Union asks, "[E]ven when a reviewing court disagrees with the Board's own interpretation and application of its own policy, should a decision be set aside absent a demonstrable abuse of discretion by the agency?" (Pet. 15.) In this case, the Seventh Circuit's decision was tantamount to a finding that the Board had abused its discretion: The Board abuses its discretion by failing to make decisions that are reasonably consistent with its precedents. *See Monmouth Medical Center* v. *NLRB, supra; NLRB* v. *Osborn Transportation, Inc.*, 589 F. 2d 1275, 1279 (5th Cir. 1979).

F. 2d 841, 852 (D. C. Cir.), *cert. denied*, 403 U. S. 923 (1971).

The Seventh Circuit explained the standard of review with admirable clarity in its opinion, App. 6a-7a:

> "In *Clelanese Corp. of America* v. *NLRB*, 291 F. 2d 224, 225 (7th Cir. 1961), this Court held that the Board's 'wide discretion' lies in the initial promulgation of rules and regulations establishing the procedures and safeguards for conducting representation elections. *See also NLRB* v. *A. J. Tower Co.*, 329 U. S. 324, 330 (1946). We went on to say, however, that the courts of appeals bear the responsibility of reviewing the Board's specific application of its rules. 291 F. 2d at 225. 'Judicial review in these cases is not concerned with the wisdom of the Board's policy but must determine whether the record as a whole supports the findings and conclusions respecting compliance with the policies, rules, and regulations promulgated by the Board.' *Id. See also NLRB* v. *Mosey Mfg. Co., Inc.*, 595 F. 2d 375, 377 n. 5 (7th Cir. 1979).
>
> The Board is not forever bound by its prior declarations of policy, and is free, for example, to exercise its discretion to alter its rules when, in the wisdom gained through experience, it concludes that its rules have failed to effectively safeguard elections or when it finds a rule to be unduly burdensome. *NLRB* v. *Mosey, supra*, 592 F. 2d at 375. Where the Board has promulgated standards governing the conduct of an election, however, those standards are controlling until the Board announces a change and its reason for the change. *See Delta Drilling Co.* v. *NLRB*, 406 F. 2d 109 (5th Cir. 1969). Until such a change is announced, the Board's application of its standards must be reasonably consistent with its previous decisions."

This is precisely the standard of review that this Court endorsed in *FTC* v. *Mary Carter Paint Co.*, 382 U. S. 46 (1965). In that case, this Court held that the Fifth Circuit improperly had overturned a ruling of the Federal Trade Commission, because the FTC's decision did not constitute "a departure from Commission policy," and thus was neither arbitrary nor clearly

wrong. 382 U. S. at 47, 49. This is directly analogous to the standard applied by the Seventh Circuit to the Board's decision in the present case.

The cases cited by the Union as demonstrating "a great diversion in principle where decision-making is involved" (Pet. 20) do not conflict with this standard of review. The Union correctly states that in *NLRB* v. *Allis-Chalmers Corp.*, 601 F. 2d 870 (5th Cir. 1979), the Court deferred to the Board's application of its own rules. But on rehearing, the Court reversed itself, denied enforcement of the Board's order and remanded the case to the Board. 608 F. 2d 1018 (5th Cir. 1979). At issue was the Board's application of its *Formco* rule that pre-election misstatements by the union concerning Board functions required a new election regardless of any opportunity the employer had to respond. *Formco, Inc.*, 233 NLRB 61 (1977). In *Allis-Chalmers*, the Board had refused to set aside an election despite such misrepresentations. The court initially resolved this apparent inconsistency with *Formco* by observing that in *Allis-Chalmers*, the union, as well as the employer, had sought to correct the union's misstatements, and that *Formco* was not a *per se* rule. On rehearing, however, the court questioned the accuracy of its conclusion that the Board had found that corrections by the union distinguished the case from *Formco*. The court refused to enforce the order in the absence of any reconciliation of the case with *Formco*, and instead remanded for clarification by the Board. This decision on rehearing is consistent with the Seventh Circuit's refusal to enforce the Board's order below, where the Board could not satisfactorily distinguish this case from *Milchem*.[13]

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13. Although the Fifth Circuit remanded *Allis-Chalmers* to the Board, it did so in order to permit the Board to explain the apparent inconsistency in its decisions. Here, the Board has already attempted to distinguish *Milchem*, and as noted above, the Seventh Circuit has properly determined that the Board had failed. Remand for further explanation from the Board is thus unnecessary.

This Court's decision in *NLRB* v. *Mattison Machine Works*, 365 U. S. 123 (1961), and the decision of the First Circuit in *Melrose-Wakefield Hospital Assn.* v. *NLRB*, 615 F. 2d 563 (1st Cir. 1980), also cited by the Union, are not inconsistent with the decision of the Seventh Circuit in this case. In *Mattison Machine Works* and *Melrose-Wakefield Hospital Association*, the courts deferred to the Board's application of its own rules, but in neither case had the Board cited specious "distinctions" in order to differentiate unreasonably between two identical sets of circumstances and reach a result unreasonably inconsistent with its prior decisions. These decisions do not conflict with the Seventh Circuit's refusal to enforce the order in this case because it was not reasonably consistent with *Milchem*. There is no reason for this Court to review this long-established and undisputed standard of review.

CONCLUSION.

For all the reasons stated above, Respondents contend that the Petition for Writ of Certiorari presents no issue warranting review by this Court, and pray that the Petition be denied.

Respectfully submitted,

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No. 80-121

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION LOCAL 28, AFL-CIO,
Petitioner

v.

MIDWEST STOCK EXCHANGE, et al.,
Respondents

and

NATIONAL LABOR RELATIONS BOARD,
Party in Interest

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Pursuant to Rule 24(4), petitioner herewith addresses a matter first raised in the memorandum submitted by the National Labor Relations Board. The brief in opposition filed by respondents has failed to bring forth any new arguments entitling petitioner under the Rule to further response, and accordingly, petitioner makes none.

The Board has stated, in Item 3 of its memorandum, at p. 4, that "it did not file its own petition because it viewed the disagreement between the Board and the court as presenting only the issue of application of the established *Milchem* principles to the particular facts here. This Court has indicated that it will not ordinarily review such an issue. *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 490-491 (1951)." This reply brief will be confined to comment on that singular view.

The pages from *Universal Camera* cited by the Board in its memorandum do not spread as wide a canopy as the Board, in its inertia, would have us believe. What this Court did say should every now and then bear repeating, 340 U.S. 474, 490-491:

> Our power to review the correctness of application of the present standard ought seldom be called into action. Whether on the record as a whole there is substantial evidence to support agency finding is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied.

If this proceeding involved no more than a substantial evidence question, petitioner would agree that it would not merit review and would not have, accordingly, brought this petition here in the face of the Board's apparent disinclination to protect its right to make determinations of fairness in elections cases. But this Court's *Universal Camera* rule has not broadened beyond what this Court said merely because it has been in existence for more than a quarter century, or because it is convenient to cite to forego a broad range of case difficulties.

Even the Board's stated perception of what the lower court held places serious doubt upon the applicability of *Universal Camera* in this case. The Board has said it viewed the lower court's disagreement as presenting "only the issue of application of the established Milchem principles to the particular facts here."

If there is only the application of established principles to particular facts (which are not even in dispute), then the question before us is purely one of law, not of substantial evidence at all! The dispute is over the principles, what they mean, how they should be applied, how they may be evaluated—judicial issues totally.

This brings us full circle to the primary question presented by petitioner in the first instance and the reasons why the writ should be granted.

The Board, in its decision in this case, applied its established principles in *Milchem* to the particular facts before it. Its principles, as we earlier stated, contained two distinct elements: (1) a prohibition of sustained or prolonged conversations so as to prevent electioneering at the polls, and (2) a rule of realism that would not embrace trifles. There was never any question of evaluating evidence to determine if its substantiality, or lack of it, supported application of these principles. The Court below distorted and amended those principles upon facts already established.

Petitioner is more concerned about the Board's failure to seek certiorari in this case when it should have done so. But we are aware of certain realities in the world of labor litigation, and because of such awareness, petitioner states herewith that no request

was even made of the Board to seek certiorari because petitioner had no confidence that the Board would do so. These realities are that the Board, in its enforcement litigation in the various courts of appeals, is taking a terrible beating in attempting to have its orders upheld. Without in any manner seeking to lay out a proper scholarly analysis of the subject, we rest upon our regular reading of the appellate rulings, week in and week out. As one isolated example, counsel opened Volume 103, Labor Relations Reference Manual, covering weeks from January 1, 1980, through April 30, 1980, admittedly a very short period of time. Some 55 decisions of reviewing courts of appeals in enforcement proceedings were catalogued, limited to holdings not decided per curiam. The effort was to focus only on cases of sufficient substance to warrant signed judicial opinion. Of these 55 cases, only 20 received full enforcement. Two others were enforced as modified, and 33 others, or 60% of the number, were either reversed in part or in whole.

Obviously, we are not contending that any particular case was decided either correctly or incorrectly. We are not even suggesting that the Board seek certiorari in any particular case, especially in view of the burdens upon the docket of this Court. We are saying only one thing, and one thing only, at this point: when an agency's decisions in cases where there are questions of substance are being set aside even in part at a rate of 60%, one might conclude that there is disarray somewhere in the spectrum.

The sole point that we are trying to make is that it behooves a private party, as is petitioner here, to occasionally seek to vindicate public rights under the

statute. The Board is not always capable of doing so. It was submitted in our petition that the ruling below is in plain violation of the principles of law handed down by this Court in *NLRB* v. *Mattison Machine Works,* 365 U.S. 123 (1961). That salutary ruling, as we read the cases in the ensuing years, has nearly atrophied from disuse or forgotten neglect.[1] The Board, battered by hordes of adverse rulings in reviewing courts, is not always able to be perceptive in what it brings to the heavy docket of this Court for review, and can easily become accustomed to allowing the principles of *Mattison Machine Works* to gather dust. It likewise has apparently not appreciated the importance in agency decision making of *Federal Trade Commission* v. *Mary Carter Paint Co.,* 382 U.S. 46 (1965).

In summary, we are appreciative, even in view of our foregoing commentary, of the burdens and difficulties confronting the Board in its selection of cases for the certiorari process. But court dockets throughout the American judicial system have their burdens, too, and to allow a ruling like the one below to go unchallenged is a massive invitation to more litigation, to more legal quibbling and re-writing of Board rules, as the lower court has done here, to more technical resistance to Board orders that will not only bring more litigation to the courts but will seriously impede the enforcement of the national labor policy.

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[1] The Board, in its brief to the Seventh Circuit, cited *Mattison,* among a mass of other cases. The opinion, of course, of the court below, made no mention whatever of *Mattison.*

The vitally important public issue in this case cannot be obscured by the Board's wounded enforcement efforts. Free and fair elections in our society cannot be cavalierly tossed aside in the courts, as happened here, without severe injury to the whole democratic process. That is far more important than the Board's appellate misperception of the scope of this case.

The writ should be granted.

Respectfully submitted,

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OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION LOCAL 28, AFL-CIO, PETITIONER

v.

MIDWEST STOCK EXCHANGE, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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Statute:

National Labor Relations Act, 28 U.S.C. 151 *et seq.* :

Section 8(a)(1), 29 U.S.C. 158(a)(1) 3

Section 8(a)(5), 29 U.S.C. 158(a)(5) 3

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 80-121

OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION LOCAL 28, AFL-CIO, PETITIONER

v.

MIDWEST STOCK EXCHANGE, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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1. Petitioner won a representation election among the private respondent's ("the Company") office and clerical employees. The Company filed objections, alleging, *inter alia*, that Jonathan James, one of petitioner's election observers, engaged in improper conversations in and away from the voting area. A hearing was held, and the hearing officer made findings and recommended overruling the objections (Pet. App. 23a-34a). The Board adopted these findings and recommendation (*id.* at 21a-22a).

The evidence showed that James engaged in various conversations in the voting area, two of which lasted about five minutes.[1] The hearing officer concluded, however, that James' conduct did not come within the prohibition of *Milchem, Inc.*, 170 N.L.R.B. 362 (1968), concerning conversations between agents of parties and voters waiting to cast their ballots.[2]

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[1] The hearing officer found (Pet. App. 27a):

> * * * James became involved in several exchanges with voters which progressed beyond mere greetings. Indeed, James even initiated some of the conversations. His activity was noticed by Board Agent Walter Hoffman, who cautioned James more than once to "cut his conversation short." Hoffman estimated that on perhaps six occasions he had to remind James that he could not go beyond greetings with voters. However, not every one of these warnings was prompted by James' actually having overstepped the bounds. In response to one caution from Hoffman to restrict conversation, James told Hoffman that he did not think he could do as requested, since it would be impolite not to speak to his friends. There is no evidence suggesting that the subject of the election, the Union, or the Employer's position was discussed during any of these conversations between James and voters in line.

[2] In *Milchem*, the Board set aside an election where a union agent spent "several minutes," "perhaps five minutes" (170 N.L.R.B. at 363) in the polling area talking to prospective voters about "the weather and like topics" (*id.* at 362). The Board held that "the sustained conversation with prospective voters waiting to cast their ballots, regardless of the content of the remarks exchanged, constitutes conduct which, in itself, necessitates a second election" (*ibid.*). The Board added (*id.* at 363):

> We intend, of course, that our application of this rule will be informed by a sense of realism. The rule contemplates that conversations between a party and voters while the latter are in a polling area awaiting to vote will normally, upon the filing of proper objections, be deemed prejudicial without investigation into the content of the remarks. But this does not mean that any chance, isolated, innocuous comment or inquiry by an employer or union official to a voter will necessarily void the election. We

The hearing officer found that the conversations were "not prolonged" and amounted to an "exchange of pleasantries" and "friendly banter" (Pet. App. 31a-32a). Thus, the hearing officer concluded (*id.* at 31a):

> Even though James spoke to voters in the corridor to an extent beyond a mere exchange of greetings, the mild nature of his activity holds it outside the bounds of the *Milchem* proscription. I conclude that it is not sufficient to warrant setting aside the election.

The Board certified petitioner as bargaining representative. When the Company refused to bargain, the Board, on summary judgment, found that the Company had committed an unfair labor practice in violation of Sections 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1) (Pet. App. 11a-20a).

2. The court of appeals denied enforcement, concluding that this case could not be distinguished from *Milchem, supra.* The court stated (Pet. App. 8a-9a):

> though the Board in *Milchem* did not attempt to designate the transition point between a "trifling" comment and a "prolonged" conversation, it unquestionably concluded that a five minute conversation falls within the latter category. The Board has failed to explain to this Court's satisfaction how a five minute conversation can be prolonged in one instance and not prolonged in another. In the

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will be guided by the maxim that "the law does not concern itself with trifles." We trust, however, that the parties to the elections, in order to obviate the sometimes troublesome task of defining what is to be considered trifling, will take pains to assure complete compliance with the rule by instructing their agents, officials, and representatives simply to refrain from conversing with prospective voters in the polling area.

absence of a Board announcement of a change in the *Milchem* standard and its reason for the change (the Board does not contend that it has overruled *Milchem*), it is our judgment that the Board misapplied its established rule.

The court stressed that it was not passing on "the wisdom of the *Milchem* rule" (Pet. App. 10a).

3. While the Board believes that the court of appeals erred in rejecting the finding that James' conversations did not require setting aside the election, it did not file its own petition because it viewed the disagreement between the Board and the court as presenting only the issue of application of the established *Milchem* principles to the particular facts here. This Court has indicated that it will not ordinarily review such an issue. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951). However, should the petition be granted, the Board will defend its decision and order.

Respectfully submitted.

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